

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 8, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1333

Cir. Ct. No. 2006CF3

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SERGEY VLADIMIR ANDREYEV,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Columbia County:
PATRICK J. TAGGART, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

¶1 PER CURIAM. Sergey Andreyev, pro se, appeals an order denying Andreyev's postconviction motion for a new trial under WIS. STAT.

§ 974.06 (2011-12),¹ and an order denying his motion for reconsideration. Andreyev contends that his trial counsel was ineffective by: (1) failing to investigate whether the charged sexual assaults were impossible based on Andreyev's erectile dysfunction (ED); and (2) failing to challenge the credibility of the victim, A.P., based on inconsistencies between A.P.'s preliminary hearing testimony and her trial testimony, on her claim that sexual intercourse had occurred in late September 2005 contrary to other evidence, and on evidence of promises made to A.P. to secure her testimony. Andreyev also argues that the circuit court violated § 974.06(3)(c) by failing to schedule a prompt hearing on Andreyev's motion. We reject these contentions and affirm.

Background

¶2 In August 2006, following a jury trial, Andreyev was convicted of three counts of second-degree sexual assault of a child and one count of obstructing an officer. On direct appeal, Andreyev's appointed counsel argued that the trial evidence was insufficient to support the sexual assault convictions and that Andreyev's statements to police should have been suppressed. We affirmed the judgment of conviction.

¶3 In September 2009, Andreyev filed a postconviction motion under WIS. STAT. § 974.06. Andreyev argued that his trial counsel was ineffective, and that his appellate counsel was ineffective by failing to raise ineffective assistance of trial counsel. The circuit court denied the motion without a hearing, stating that Andreyev had not established why he did not argue ineffective assistance of

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

counsel in his direct appeal and had not set forth sufficient facts as to ineffective assistance of appellate counsel. Andreyev moved for reconsideration, contending that he had a sufficient reason for failing to raise ineffective assistance of trial counsel on direct appeal, namely, ineffective assistance of appellate counsel. The court denied the motion for reconsideration.

¶4 Andreyev appealed, and the State conceded that the circuit court erred by denying Andreyev's motion without a hearing. We summarily reversed and remanded to the circuit court for a hearing. The circuit court held an evidentiary hearing and the parties submitted written arguments, and the court then denied Andreyev's WIS. STAT. § 974.06 motion. The court found that Andreyev's trial counsel's testimony at the hearing established that trial counsel was not ineffective.² Andreyev moved for reconsideration, which the court denied. Andreyev appeals.

² Our order in the prior appeal had summarily reversed and remanded for a hearing as to whether postconviction counsel provided ineffective assistance by failing to preserve an issue, which, we stated, would in turn establish a sufficient reason why Andreyev failed to raise that issue on direct appeal. At the postconviction motion hearing, Andreyev's trial counsel testified as to his trial strategy, and the circuit court found that trial counsel was not ineffective.

In this appeal, Andreyev includes an argument that his appellate counsel was ineffective by failing to raise ineffective assistance of trial counsel on direct appeal. The State responds that Andreyev did not establish ineffective assistance of appellate counsel because his appellate counsel did not testify at Andreyev's postconviction motion hearing. However, we need not address ineffective assistance of appellate counsel. The circuit court addressed the merits of Andreyev's ineffective assistance of trial counsel claims, and we do so as well. Because we conclude that Andreyev's trial counsel was not ineffective, Andreyev's postconviction motion for a new trial fails on the merits, and we need not address whether ineffective assistance of postconviction or appellate counsel provided a sufficient reason for Andreyev's failure to raise ineffective assistance of trial counsel on Andreyev's direct appeal.

Standard of Review

¶5 We review a claim of ineffective assistance of counsel under a mixed standard of review. *State v. Manuel*, 2005 WI 75, ¶26, 281 Wis. 2d 554, 697 N.W.2d 811. The circuit court’s findings of fact are upheld unless clearly erroneous, and we independently review the application of legal principles to those facts. *Id.*

¶6 We independently interpret statutes and apply them to the facts of a case. *Estate of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶10, 318 Wis. 2d 553, 769 N.W.2d 481.

Discussion

¶7 Andreyev contends that he was denied the effective assistance of counsel at trial. *See Strickland v. Washington*, 466 U.S. 668 (1984). Andreyev argues that his counsel failed to obtain evidence of Andreyev’s ED or make use of evidence related to his ED that was already in the record. Andreyev contends that evidence related to his ED was necessary to the defense to show improbability of the crime, to lend support to Andreyev’s testimony denying the sexual assaults had occurred, and to challenge A.P.’s credibility. *See id.* at 687 (claim of ineffective assistance of counsel “must show that counsel’s performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed defendant by the Sixth Amendment”). He argues that, had counsel obtained that evidence or made effective use of the evidence in the record, there was a reasonable probability of a different result at trial. *See id.* at 694 (claim of ineffective assistance of counsel must show that “the deficient performance prejudiced the defense,” that is, that, absent the errors, there was a reasonable probability of a different result at trial). We disagree with Andreyev’s

contention that any of the alleged trial errors, individually or together, denied Andreyev the effective assistance of counsel.

¶8 First, Andreyev argues that his trial counsel was ineffective by failing to hire a medical expert to examine Andreyev for ED in order to present evidence of Andreyev's ED at trial. Andreyev contends that medical expert testimony was necessary to support his defense that he was unable to have sexual intercourse due to ED. He argues that his trial counsel did not conduct a proper investigation to obtain necessary medical support for the defense.

¶9 At the postconviction motion hearing, Andreyev's trial counsel, Mark Bennett, testified that Andreyev told Bennett that he was unable to attain an erection due to ED following a car accident in January 2003. He explained that the theory of defense at trial was that Andreyev never had sex with A.P. and that Andreyev was unable to attain an erection due to ED. Bennett testified that Andreyev never provided Bennett with any contact information for Bennett to obtain documentation of the ED, that Bennett's recollection was that there was no supporting documentation, and that Bennett would have obtained supporting medical records if any existed.

¶10 Bennett did not recall having any conversations with Andreyev about obtaining a medical examination to support his claim of ED. Bennett testified that he was aware Andreyev had a personal injury claim pending in Massachusetts based on the January 2003 accident, and that Bennett contacted the attorney representing Andreyev on the personal injury claim. Bennett testified that he did not remember discussing Andreyev's claim of ED with Andreyev's personal injury attorney, and that he recalled from his conversations with the personal injury attorney that the attorney indicated that the accident resulted in a

head injury to Andreyev. He testified that Andreyev never indicated that ED was part of the personal injury claim.

¶11 Andreyev testified that he was unable to attain an erection since 2003, but that he never received any treatment for that condition. He stated that he believed that the 2003 accident caused his ED. He also stated that he did not have any medical documentation of his ED.

¶12 We conclude that Andreyev has not established that counsel was ineffective by failing to obtain a medical evaluation of Andreyev for use at trial. Andreyev does not explain how a medical evaluation at the time of trial would have established that Andreyev was entirely unable to attain an erection at the time of the charged sexual assaults.³ Because there was no evidence that Andreyev's trial counsel could have obtained evidence to show that, at the time of the sexual assaults, Andreyev was unable to commit the crime, counsel was not ineffective by failing to do so.⁴

³ As we explained in our opinion affirming Andreyev's conviction on direct appeal, A.P. testified at trial that Andreyev had difficulty maintaining an erection, but that did not render her testimony insufficient to support the conviction. *State v. Andreyev*, No. 2007AP2555, unpublished slip op. (WI App Oct. 9, 2008). Rather, "[r]egardless of whether Andreyev had trouble continuing the sexual act once it had commenced, he is guilty of the crime." *Id.*, ¶4. This is because "sexual intercourse" requires only an "intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening." See WIS. STAT. § 948.01(6) (2005-06).

⁴ The circuit court found that evidence that Andreyev suffered from ED either did not exist or Andreyev did not give Bennett sufficient information to obtain that documentation. Andreyev does not dispute that finding. Andreyev does assert, however, that he contacted his personal injury attorney after the circuit court issued its decision denying Andreyev's WIS. STAT. § 974.06 motion, and that the attorney informed Andreyev that he has no recollection of discussing Andreyev's medical condition with Bennett. Andreyev asserts that he submitted his letter to his personal injury attorney and the attorney's response to the circuit court with his motion for reconsideration, and that, therefore, the circuit court erred by determining that the motion for reconsideration did not present any new issues. The State disputes that this evidence

(continued)

¶13 Next, Andreyev argues that his trial counsel was ineffective by failing to use the evidence in the record to bolster Andreyev's claim that his ED prevented him from engaging in sexual intercourse and to challenge A.P.'s credibility. He argues that counsel should have challenged A.P.'s trial testimony that Andreyev had not discussed his ED with her by reference to her testimony at the preliminary hearing that Andreyev had discussed his ED with her. He argues that A.P.'s contradictory testimony bore upon the central issue of credibility in this case, and counsel's failure to utilize the contradictions precluded the jury from considering evidence that would have been helpful to the defense. However, as the State points out, the inconsistencies between A.P.'s testimony on this issue at the preliminary hearing and at trial were minor. At the preliminary hearing, A.P. testified that Andreyev was able to attain an erection, but had problems maintaining the erection. She also testified at the preliminary hearing that Andreyev "sometimes" discussed that problem with her. At trial, A.P. testified that she never discussed ED with Andreyev and he never told her he had ED. A.P. testified that Andreyev had trouble maintaining an erection and that A.P. was aware that Andreyev was taking herbal medication to help with that problem, but that Andreyev never discussed with her why he was having a problem maintaining an erection. Thus, contrary to Andreyev's assertion, A.P.'s testimony at trial was not "diametrically opposite" her testimony at the preliminary hearing.

is properly in the record. However, as the State also asserts, even if Andreyev had established that his personal injury attorney has no recollection of speaking with Bennett, that does not establish that Bennett did not speak to the attorney. Moreover, it certainly does not establish that the attorney would have been able to provide Bennett with evidence that Andreyev had been unable to attain an erection at the time of the sexual assaults. Because this issue lacks merit, we do not address it further.

¶14 Moreover, Bennett testified at the postconviction motion hearing that he made a strategic decision not to pursue this issue at trial. Bennett explained that he did not want to give A.P. the opportunity to explain, as she had at the preliminary hearing, that Andreyev was able to attain an erection. Bennett recalled that A.P. testified in rebuttal that she and Andreyev never discussed ED. Bennett explained that his argument in closing was going to be that A.P. testified that Andreyev had a problem with erections, and that Andreyev asserted the problem was that he could not attain an erection. Bennett explained that his reasoning in not questioning A.P. further on that issue was that he did not want to give A.P. the opportunity to again explain that Andreyev had been able to attain an erection. Because Bennett testified to having had a valid trial strategy for failing to question A.P. as to any inconsistency between her testimony at the preliminary hearing and at trial, this issue does not support an ineffective assistance of counsel claim. See *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996).

¶15 Andreyev also argues that counsel should have challenged A.P. on her testimony that she and Andreyev had sex in late September 2005, because there was no charge that Andreyev and A.P. had sex in that time frame and the evidence indicated that Andreyev was not in Wisconsin at that time. He asserts that a challenge to A.P.'s testimony that she and Andreyev had sex in late September 2005 would have been significant on the issue of credibility. However, as the State points out, Andreyev was not charged with a sexual assault in late September 2005, and the jury found Andreyev not guilty of the charge of sexual assault in early September 2005. Additionally, Bennett testified at the postconviction motion hearing that he considered this issue at trial, and he had made a question mark in his notes as to A.P.'s testimony that she and Andreyev

had sex in late September 2005. Bennett could not recall exactly why he did not follow up with that issue, but he pointed out that A.P. had testified that she had met with Andreyev and had sex with him so many times that she could not remember the exact dates. On this record, we conclude that Andreyev has not established that counsel's performance was deficient or that any deficiency prejudiced his defense. A.P.'s failure to remember exact dates over an extended time frame would not have significantly impacted her credibility. In any event, the jury concluded that the State did not carry its burden in proving that A.P. and Andreyev had sex in September 2005.

¶16 Andreyev's final claim of trial counsel error is that counsel failed to present evidence of promises made to A.P. to secure her testimony. However, Bennett testified at the postconviction motion hearing that he conducted an investigation into whether any significant promises were made to A.P. to secure her testimony, and that he did not discover any. Bennett also testified that he questioned A.P. at the preliminary hearing on this issue. A.P. testified at the preliminary hearing that the only promise made to her was that she would not get into trouble. Bennett explained that he decided not to pursue that issue at trial because he did not think it would lead to testimony of any significant promises to secure A.P.'s testimony. Again, a valid strategic choice by counsel is not ineffective assistance. *See id.*

¶17 Andreyev argues that even if none of the claimed errors amounted to ineffective assistance of counsel, together they rendered counsel ineffective. We disagree. We have explained why each claim of trial counsel error lacks merit; "[z]ero plus zero equals zero." *See Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976).

¶18 Andreyev also asserts that the circuit court violated WIS. STAT. § 974.06(3)(c) by failing to “[g]rant a prompt hearing” on Andreyev’s motion. He notes that there was a span of two and one-half years between his filing of his § 974.06 motion in September 2009 and the circuit court decision on the motion in April 2012. Andreyev cites the dictionary definition of “prompt” as including “without delay,” “immediate,” and “punctual.” The record refutes Andreyev’s claim that the circuit court failed to comply with the statute.

¶19 Following Andreyev’s filing of his WIS. STAT. § 974.06 motion in September 2009, the circuit court denied the motion without a hearing and Andreyev appealed, and we reversed and remanded on April 29, 2010. Andreyev then moved the circuit court for substitution of judges and appointment of counsel, both of which were ultimately ordered by the court as of June 30, 2011. The circuit court held the postconviction motion hearing on December 19, 2011. Thus, the delay between the filing of the motion and the granting of a hearing was largely due to the particular history of this case. Andreyev has not pointed to any evidence that there was unnecessary delay in this case. We affirm.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

